Supreme Court, U.S.
FILED
MAY 23 1994
OFFICE OF THE CLERK

No. 93-1584

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SANDY DIANA HIRRAS,
Petitioner,
v.
NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1534

SANDY DIANA HIRRAS,

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Respondent.

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PETITIONER'S REPLY BRIEF

ARGUMENT

A. In our *certiorari* petition, we showed that the two questions presented in this case are closely related to the questions presented in *Hawaiian Airlines v. Norris,* No. 92-2058, which was argued to this Court on April 28, 1994, and is currently pending disposition on the merits.

Respondent concedes that "this Court's decision in *Hawaiian Airlines* could have some impact on this case." Brief of Respondent in Opposition ("Resp. Br.") at 6 n.4. But respondent nevertheless argues that the pendency of *Hawaiian Airlines* does not even provide a basis for holding the petition here for the disposition of *Hawaiian Airlines.* That argument is doubly flawed.

1. By respondent's own admission, "this Court's decision in *Hawaiian Airlines* could have some impact on this case," as that decision will likely "address the scope of the grievance-abitration procedure created by the [Railway Labor Act]." Resp. Br. 6 n.4. That is more than a sufficient reason in itself for this Court to hold the instant petition until the decision in *Hawaiian Airlines.*

2. Respondent's efforts to distinguish the issues in this case from those in *Hawaiian Airlines* are entirely without merit.

a. Respondent asserts that "*Hawaiian Airlines* does not involve the forum selection issue presented in this case." Resp. Br. 6. n.4.[1] This assertion is factually incorrect.

Hawaiian Airlines has presented to this Court the same theory regarding the scope of the RLA grievance adjustment boards' exclusive jurisdiction that AMTRAK proffers here.[2] Moreover, the respondent airline employee in *Hawaiian Airlines* and the petitioner railroad employee here have provided the same counter: *viz.* that the RLA grievance adjustment boards have "exclusive jurisdiction" *only* over claims based on rights that are derived from the agreements and understandings between the collective-

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[1] The "forum selection issue" refers to the issue raised by respondent's theory, adopted by the court below, that Congress has vested the grievance adjustment machinery of the RLA with "exclusive jurisdiction" over *any* employee claims against RLA-covered employers, as long as the claims are "founded upon an incident of the employment relationship between [the employee] and [the RLA-covered employer]." Pet. App. 8a; *see also id.* at 4a.

[2] *See, e.g., Hawaiian Airlines,* Opening Brief of Petitioner at 30 ("the RLA dispute mechanism procedures are mandatory and exclusive for all disputes within the RLA's scope . . . [and] RLA jurisdiction extends to disputes over discipline and discharge where the grievance arises from incidents of the employment relationship not covered by a collective agreement"; internal quotation marks omitted). *See generally Hawaiian Airlines,* Opening Brief of Petitioners, at 9-11, 23-30; *Hawaiian Airlines,* Reply Brief of Petitioners, at 14-17.

bargaining parties, and *not* over claims based on independent public law rights of the individual employees. *See Hawaiian Airlines.* Brief for Respondent 15-40.

b. In an argument limited to Question 2 in the petition, respondent asserts that the employee's state law claims in *Hawaiian Airlines*, unlike the employee's state law claims here, are "not dependent on an interpretation of . . . any . . . provision of the [collective bargaining agreement]." Resp. Br. 18 (quoting *Hawaiian Airlines*, 842 P.2d 634, 645 (Haw. 1992) (ellipses and brackets in Resp. Br.)). Once again, respondent is wrong.

In this case, as in *Hawaiian Airlines*, an employee (who happens to work under an RLA-covered collective bargaining agreement) asserts *state law rights* regarding workplace conditions, and contends that an action asserting such rights is *not* preempted by the RLA as long as the rights at issue are public law rights that apply to employees generally, rather than rights under the RLA-governed collective bargaining agreement. And, in this case, as in *Hawaiian Airlines*, the employer contends that federal law preempts any state law actions which would require examining working conditions that happen to be subject to an RLA-governed collective bargaining agreement—regardless of the source of the rights at issue—since a court, in any such action, may have to construe the RLA agreement. The Hawaii Supreme Court adopted the employee-plaintiff's understanding that federal law does not preempt such a claim; the court below adopted the employer-defendant's preemption theory. These different understandings of federal law—and not some difference in the facts or issues presented—explain the contrary dispositions of the state law claims in the Hawaii Supreme Court's *Hawaiian Airlines* decision and in the Fifth Circuit's decision below.

Thus, as we demonstrated in the petition, this Court should, at the least, hold the instant petition pending disposition of the *Hawaiian Airlines* case.

B. Respondent's assertion that the decision below does not conflict with the decisions of any other federal courts of appeals (*see* Resp. Br. 6-8), is no more persuasive.

1. The Fifth Circuit candidly admitted that its decision is in conflict with a decision of the Second Circuit. *See* Pet. App. 12a (rejecting petitioner's reliance on *Bates v. Long Island R.R.*, 997 F.2d 1028 (2d Cir.), *cert. denied*, 61 L.W. 3375 (1993), because "the Second Circuit erred in *Bates*").

Nevertheless, respondent argues that *Bates* involved a federal claim under "an entirely different statute: § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794," and that an "[a]ccommodation of the RLA with other employment legislation cannot be undertaken categorically, but should be considered on a statute by statute basis." Resp. Br. 7.

The difficulty is that neither the decision below, nor respondent's overall theory of this case, rests on any such statute-by-statute analysis. Thus, the decision below explained its theory of dismissal in the broadest of terms, which clearly conflict with the *Bates* holding and rationale: Petitioner's federal statutory claim was held subject to dismissal because it "is founded upon an incident of the employment relationship between her and [her RLA-covered employer] thus making her claim a minor dispute under the RLA and subject to the exclusive jurisdiction of the NRAB." Pet. App. 8a.[3] And, similarly, respond-

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[3] In arguing that the decision below rests on a particularized analysis of Title VII—rather than on any broad theory regarding the scope of RLA "exclusive jurisdiction"—respondent notes that the court below cites § 118 of the Civil Rights Act of 1991, which, in the Title VII context, encourages "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration." Pub. L. No. 102-166, § 118. Although the decision below did, in one brief sentence, note the existence of this provision, *see* Pet. App. 7a-8a, that decision does not rest its holding on any such narrow basis. In any case, as we

ent argued below—and, indeed, argues elsewhere in its brief in opposition—precisely the same broad theory of dismissal that was accepted below and rejected in *Bates*. *See* Resp. Br. 9 ("the types of disputes that must be submitted to RLA grievance-arbitration processes" encompasses all "disputes independent of collective agreements . . . so long as they are 'founded upon some incidents of the employment relation' ").[4]

2. Respondent urges as well that the decision below presents no conflict with the decisions of the Eighth and Tenth Circuits, on which we relied in our petition. But, as is true of the Second Circuit's *Bates* decision, the decisions of the Eighth and Tenth Circuit squarely reject the proposition that is the cornerstone of respondent's theory—and the theory of the court below—*viz.*, that the "exclusive jurisdiction" of the RLA grievance adjustment boards deprive a federal court of jurisdiction over an

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show, *infra* at pp. 6-7, § 118 of the 1991 Civil Rights Act cannot even plausibly provide support for the decision below.

[4] In a further effort to distinguish *Bates*, respondent argues that the employer there had sought to have the employee's employment-related statutory claims dismissed from court without explicitly asserting that those same claims could properly be brought before the RLA adjustment boards. But even the briefest examination of *Bates* shows that the employer's argument there and the employer's argument here are essentially the same. Both employers argued, in the words of the *Bates* court, that a district court "lack[s] subject matter jurisdiction over" federal, employment-related, statutory claims against an RLA-covered employer, because such claims "are 'minor disputes' under the RLA," and, as such "must be resolved pursuant to the exclusive dispute resolution procedures outlined in § 3 of the RLA. 45 U.S.C. § 153." 997 F.2d at 1034. And, both employers argued that *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), bolsters this theory, by establishing a federal policy supporting the dismissal of federal employment-based claims in favor of their resolution elsewhere. *Id.* The only significant difference between the *Bates* decision and the decision below is that the Second Circuit squarely rejected these employer arguments and the Fifth Circuit fully accepted them.

employee's independent, federal, employment-related, statutory causes of action. *See McAlester v. United Airlines*, 851 F.2d 1249, 1252, 1254 (10th Cir. 1988) (rejecting employer's contention that RLA's "minor dispute" system "precludes the district court's subject matter jurisdiction over [independent federal statutory] claim," because policy of exclusive jurisdiction "does not apply necessarily to independent rights or claims derived from *federal* statutory schemes"); *Norman v. Missouri Pacific Railroad*, 414 F.2d 73, 83 (8th Cir. 1969) (rejecting theory that "the Railway Labor Act . . . place[s] exclusive jurisdiction over [actions to enforce federal statutory rights] in . . . [the] National Adjustment Board").

Thus, as we demonstrated in the petition, there is a clear conflict in the circuits on this important issue.

C. Although we generally anticipated respondent's arguments on whether the decision below is correct (*see* Pet. 13-25), and, therefore, rest on our prior submission in that regard, respondent's brief in opposition does raise one new argument that warrants a response: *viz.*, that the decision below is mandated by the authority of new legislation, § 118 of the Civil Rights Act of 1991, which declares that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII]." Pub. Law 102-166, § 118.[5]

The fair reading of this language is that § 118 refers to "arbitration" in its normal sense: *viz.*, an alternative dispute resolution procedure mutually and voluntarily agreed upon by the parties to the dispute. *See AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648 (1986) ("arbitration is a matter of contract and a

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[5] As we have already noted, the decision below did not rest, in fact, on that provision. *See* n.3, pp. 4-5, *supra*.

party cannot be required to submit to arbitration any dispute which he has not agreed so to submit").[6]

Petitioner here, has never agreed to the "arbitration" of her dispute. Indeed, respondent's theory has never been that there is any agreement by petitioner to arbitrate; rather, respondent's theory (which we refute in the petition, *see* Pet. 13-25) is that Congress, in passing the RLA, *mandated* that *all* employment related disputes of any nature be considered to be within the "exclusive jurisdiction" of the RLA's grievance adjustment boards.

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[6] Moreover, the legislative history of § 118 makes clear that *all sides in the Congress agreed*—although there was disagreement on other issues relating to § 118—that the provision should not support the dismissal of Title VII court claims in the absence of the Title VII parties' knowing and voluntary agreement to arbitrate.

This was certainly the view of the provision's Democratic sponsors, who believed that § 118 should *never* support the dismissal of a Title VII court action. *See* H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 97 (1991) (§ 118 encourages only "the use of alternative dispute resolution mechanisms [where they] supplement, not supplant, the remedies provided by Title VII. Thus, for example, . . . any agreement to submit disputed issues to abitration . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII."); *id.*, pt. 2, at 41 (same); 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (Rep. Edwards) (provision "is intended to supplement, not supplant, remedies provided by Title VII, and is not to be used to preclude rights and remedies that would otherwise be available"). *Cf.* H.R. Rep. No. 40, *supra*, pt. 2, at 78 (minority views) (complaining that the provision does not promote the use of arbitration as an alternative to the courts, even where arbitration agreements are "knowingly and voluntarily undertaken").

And this was also the understanding of § 118's Republican supporters, who emphasized the need for "knowing and voluntary" agreements. *See* 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (Rep. Hyde) (§ 118 only operates to promote alternative methods for resolving Title VII disputes "where the parties knowingly and voluntarily elect to use these methods"); *id.* at S15478 (daily ed. Oct. 30, 1991) (Sen. Dole) (same).

Thus, § 118 simply has no relevance to respondent's theory.[7]

CONCLUSION

For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[7] Despite the fact that petitioner has never agreed to arbitration, respondent repeatedly relies on cases dismissing court actions because the parties to the actions in question had *agreed* to arbitration. *See* Resp. Br. 11-13 & 15-16. Respondent argues that reliance on these cases is justified because Congress' decision to subject all employee claims to the jurisdiction of the RLA grievance adjustment boards is the functional equivalent of an individual's agreement to arbitrate. *See* Resp. Br. 16 n.12. This argument assumes its conclusion and, thus, does not further the enterprise of resolving the matter at issue in this case: *viz.*, *whether* Congress ever made such a decision. And, as the petition demonstrates, Congress has not made any such decision. *See* Resp. Br. 11-13 & 15-16.